

**Before the  
Federal Communications Commission  
Washington, D.C. 20054**

In the Matter of:	)	
	)	
Comments requested on A La Carte and	)	MB Docket No. 04-207
Themed Tier Programming Distribution on	)	
Cable Television and Direct Broadcast	)	
Satellite Systems.	)	

**COMMENTS OF BROADBAND SERVICE PROVIDERS ASSOCIATION**

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## **SUMMARY**

The Broadband Service Providers Association (“BSPA”) is an organization of a new breed of last-mile service providers – companies that are building new, facilities-based, advanced, last-mile broadband networks for the delivery of compelling bundles of voice, multichannel/on-demand video, and high-speed data/Internet services directly to homes and small businesses across the country.<sup>1</sup> Its mission is to promote and support the development of a competitive, facilities-based, broadband industry which will increase infrastructure investment, create customer choice, lower prices, and provide critical network diversity.

During the past year different forms of A La Carte program structures have been proposed and debated as potential solutions to several ongoing industry issues. It is the position of the BSPA that all discussions regarding A La Carte options need to draw clear distinction between Mandatory A La Carte and Voluntary A La Carte. The BSPA and its individual members oppose all forms of Mandatory A La Carte where regulation mandates specific carriage of individual channels. At the same time, the industry issues related to consumer choice, increasing cable rates, and consumer control of “indecent” content, are very real issues needing new solutions. Maintaining the status quo is simply not acceptable. The industry should take the responsibility to find better solutions to these issues.

Voluntary A La Carte is a solution that should receive further evaluation. Voluntary A La Carte would give the multichannel video program distributor (“MVPD”) the freedom to respond to consumer desires and offer new mini-tiers or individual channels of content, along

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<sup>1</sup> The current members of BSPA, all of which are last-mile, facilities-based providers, are: Astound Broadband; Black Hills Fibercom; Everest Connections; Gemini Networks; Knology; Prairie Wave Communications; RCN Corp.; Starpower Communications, LLC; Utilicom Networks LLC; and SureWest.

with the current bundles of content offered by all MVPDs. Voluntary A La Carte has significant potential that could be fully realized as the industry continues down its committed path to deployment of full digital systems that do not have the technical limitations of today's analog networks. This option cannot be fully understood, evaluated, or appreciated unless it is subjected to a multi-year market test. BSPA members believe that Voluntary A la Carte could be both pro-consumer and pro-competition. Several BSPA members are therefore willing to bear the cost of implementing a multi-year test of Voluntary A La Carte to more fully determine its benefits and potential issues. Voluntary A La Carte can be evaluated as a potential structure that could become fully available to all MVPDs as we migrate to fully digital system structures. We will therefore seek the full endorsement and support of both the FCC and Congress for a Market Test of Voluntary A La Carte.

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The Broadband Service Providers Association (“BSPA”) hereby submits these comments in response to the Federal Communications Commission’s (“Commission”) Notice of Inquiry in the captioned proceeding (“*Notice*”).<sup>2</sup> In the *Notice*, the Commission seeks information, comment, and analysis regarding A La Carte and Themed Tier Programming Distribution on Cable Television and Direct Broadcast Satellite Systems.

**INTRODUCTION AND BACKGROUND**

Through the *Notice*, the Commission has begun the process of preparing its comments in response to a request for information regarding A La Carte from two committees of the United States Congress. Several options of A la Carte programming have been actively discussed in both the House and Senate during the past year. The FCC has been asked to gather both data and comment regarding A La Carte Programming options as additional background for proposed legislation.

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<sup>2</sup> *Comments requested on A La Carte and Themed Tier Programming distribution on Cable Television and Direct Broadcast Satellite Systems*, MB Docket No. 04-207, *Public Notice of Inquiry* (rel. May 25, 2004) (“*Notice*”).

Today's broadband service providers ("BSPs") are providing state-of-the-art video, voice, and data service over newly deployed advanced local networks in many large cities and rural areas throughout the country. While BSP's still represent a relatively small segment of the total industry, they are leaders in deploying bundled telecommunications services using a business model that many other MVPDs are adopting today. BSPs are leaders in migrating video to the all-digital platform Congress envisioned and the FCC has begun to implement. Many current BSP systems already offer the basis for fully digital capabilities. BSP's therefore offer a unique insight into both the systems and facilities based competition that continues to be the desire of most regulators and legislators.

New infrastructure investments throughout the industry are now focused on next generation systems that host multiple services that include different combinations of multichannel video, high-speed data ("HSD") Internet service (commonly referred to as "broadband access"), and voice telephone services. Continuing technological advancements are converting more and more services to digital formats, with a shift towards bidirectional functionality, allowing greater subscriber interaction with content that has historically been one-way.

The migration of infrastructure to a digital platform has set the stage for the continuing convergence of telecommunications services through all-digital systems. With the support and encouragement of regulators, the industry is making significant investments in the conversion to all-digital systems. This migration to all-digital formats is expected to bring significant benefits in the areas of spectrum recovery and utilization, expanded system capacity versus analog formats, greater two way communication capability, and the increased control, flexibility and consumer choice related to the use of digital content.

An additional benefit of an all-digital world should be the added flexibility of delivering better choice to consumers. Consumers should have a choice in telecommunications provider, a

choice in content, and a choice in new and varied packages that today's analog systems cannot technically or economically handle.

## **DISCUSSION**

### **I. THE MVPD INDUSTRY CONTINUES TO HAVE SIGNIFICANT ISSUES WITHOUT SATISFYING ANSWERS.**

#### **A. Consumers continue to have significant limitations on the choice of content they wish to purchase and MVPDs that compete with each other have significant limitations on their ability to offer content in different packages.**

A common complaint of consumers is that in order to receive desired video programming, they are required to purchase a significant amount of programming that they do not want. A typical example is a person who has no interest in sports, who is forced to buy a standard basic cable TV package, including sports, to gain access to other content of interest. This structure exists because industry content distribution contracts mandate bundling less popular content with content that is considered essential, in this case sports programming.

In fact, some programmers have enough market leverage to condition their program contract on a requirement that their network(s) be offered in the "most widely distributed tier" of service. These types of contract tying requirements are common throughout the industry. Moreover, throughout the nation, content packages offered to consumers of cable and satellite service are far more identical than not as a result of "most favored nations" and similar contract terms and conditions used throughout the industry. However, this practice seems limited to the video programming industry--other markets for consumer services do not seem to constrain consumer offerings by requiring consumers to buy significantly more of a particular type of service than the consumer wants.

#### **B. Cable Rates continue to rise at almost 3 times the rate of inflation while consumers are forced to pay for high cost content they don't want.**

In addition to consumer choice, the issue of escalating cable rates is a concern. Debates regarding rate increases during the past two years have drawn attention to sports programming as

a major contributing factor to rate increases. Consumers may not be aware that the largest single portion of an expanded basic subscription fee is related to the sports programming. As a result, a consumer that does not desire sports programming is not only forced to receive sports programming but is required to absorb a major portion of the increase in cable rates related to sports programming. Clearly, this uneconomic practice degrades consumer welfare.

**C. Consumers are forced to accept and pay for content they morally object to.**

Recent indecency issues have taken the issue of consumer choice into a new area. Today's structure not only forces consumers to pay for undesired programming, but additionally requires some consumers to pay for programming that the consumer finds indecent or morally objectionable. Allowing consumers to choose not to pay for this programming is not the equivalent of censorship.

Proposed blocking solutions, which would allow a consumer to block out the objectionable content but still charges consumers for the content, are simply inequitable and not acceptable long-term solutions. That consumers could simply not subscribe to MVPD service is not a rational solution to the problem because consumers rely and use MVPD services for increasing amounts of information, entertainment and related services. Our industries planned conversion to all-digital formats will only increase consumer reliance on these communications channels. This is an issue of providing a structure that allows consumers to have some legitimate control over what is brought into their homes. The emerging digital structures, which will expand the number of channels and services offered to consumers, should be paired with policies that increase consumer choice over programming received.

**D. A Limited number of powerful media conglomerates are positioned as gatekeepers on new content.**

BSPA members are concerned that today's structure creates an environment that could ultimately lead to more industry consolidation, less diversity, and less opportunity for



independent content producers. These issues are compounded by the vertical integration that exists between content producers and major content distributors. An article in The Wall Street Journal, January 19, 2004, went so far as to declare Comcast, with its current industry position, as the default “gate keeper”<sup>3</sup> for any new content producer that wants to get carriage. This article did not factor in the impact of further consolidation if Comcast had been successful in its bid for Disney.

Commitments to diversity would not be served well if a relatively small number of media conglomerates were able to impose their beliefs, business preferences, and bias into the types of content that become available to the general public. There is a natural bias for a content distributor to favor the introduction of programming in which they have a financial interest. Today’s structure allows a content producer to create a new channel and demand carriage by tying it to the carriage of other established or essential content guaranteeing it immediate distribution and revenue regardless of the true consumer demand. The emerging all-digital platforms will either create greater opportunities for expanded diversity, or increase opportunities for the mega conglomerates to use market power to influence the content that consumers are required to purchase.

**E. The frustration and consumer demands for better solutions to these industry issues will not disappear.**

There are very few sets of issues that have a broader group of advocates for change than those seeking new solutions to these MVPD industry issues. The combination of a desire for better consumer choice, lower cable rates, better consumer control over content deemed indecent, and assuring diversity creates issues that are both bipartisan and consumer driven. We

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<sup>3</sup> The Wall Street Journal, Marketplace, January 19, 2004. “*Want to Start a TV Channel? See Amy Banse*”. By

feel the industry needs to accept the compelling reality of these issues and commit itself to finding better solutions before someone else's solutions are imposed on the industry.

## **II. PROPOSED SOLUTIONS THAT WILL NOT WORK**

The BSPA is concerned that the negatives associated with some proposed solutions outweigh their perceived benefits.

*Mandatory A La Carte.* Historical frustration over these industry issues has created proposals for Mandatory A La Carte. In its most extreme form this would require an MVPD to offer every channel as an independent choice. This structure is neither economically sustainable nor necessary to meet the consumer desire for additional choice and control. The relevant issues go beyond the core network capabilities and customer premise equipment. Billing systems, customer service and numerous other aspects of an MVPD's operation would also be affected. Mandatory A La Carte could force an MVPD to provide service at a loss or create system requirements that would limit desired investments in new facilities based competition when the expansion of facilities based competition is one of the desired solutions to many of today's industry issues.

*A La Carte in Analog Tiers.* Some proposals that would apply to analog services ignore technical difficulties that would make implementation near impossible. The added cost of any form of analog A La Carte would off set any near term benefits. New solutions need to focus on the digital systems we have committed to support and implement. The industry has already committed itself to eliminating the status quo by migrating to all digital platforms.

*Consumer Activated Blocking.* As discussed above, proposals for consumer controlled screening or blocking as a permanent solution to indecency issues are not satisfactory, long-term

solutions. These solutions address the indecency issue alone and leave for another day, the issue of cable rates and they continue to force consumers to financially support content they feel is morally objectionable.

*Maintaining the status quo is also not an acceptable solution.* We believe that the described issues deserve better solutions and that fully digital networks create options that are not functionally available in legacy analog systems. It is time for the industry to explore new options and pursue better solutions to these legitimate issues. The industry has already committed itself to eliminating the status quo by migrating to all digital platforms. The Commission should view this migration as an opportunity to also address the issues of consumer choice, cable rates and indecency instead of focusing on imposing costly policies on outdated technologies.

### **III. VOLUNTARY “A LA CARTE” IS A POTENTIAL SOLUTION THAT DESERVES MARKET EVALUATION.**

Voluntary A La Carte is created when distributors are given the freedom to offer content in a variety of packages or tiers that are different than the content bundles driven by the constraints of “most widely distributed tier” requirements in today’s structure. This does not mean that today’s standard cable structure is eliminated. It does mean that MVPDs could offer content in additional alternative packages that can address expressed consumer desire for more choice, control and flexibility. These new offerings could include new mini-tiers of content or individual channels. This structure would enhance competition among MVPD distributors by allowing competing distributors the opportunity to define and offer their own solutions to consumer requests for either choice or diversity. It would also provide greater opportunities for consumers to validate the content they really want to support and pay for with a better understanding of the relative costs of different content that is effectively hidden under the umbrella of today’s large, contractually-obligated, standard cable packages.

The BSPA proposes that Voluntary A La Carte be evaluated with a multi-year market test, the results of which can be used to assess both the benefits and potential issues presented by this structure. Several BSPA members that have advanced digital systems are willing to be test locations. The option of Voluntary A La Carte would also need to be offered to all other MVPDs that were willing to participate in the test. Testing prior to the complete conversion to all-digital systems is an incremental approach. Without some legitimate market testing there are too many unknowns or projected assumptions to be able to fairly judge the final outcome. It is possible that the benefits of Voluntary A La Carte are such that the opportunity to implement Voluntary A La Carte should be tied to the industry conversion to all digital formats.

#### **IV. WHAT NEAR TERM VOLUNTARY “A LA CARTE” WOULD LOOK LIKE.**

Voluntary A La Carte does not mean the elimination of today’s bundled content structure. Some packages of delivered content offered today could be maintained. While there are significant implementation issues and details to work through, additional “A La Carte” options for consumers to purchase mini-tiers and/or individual channels would be offered as digital content. It is expected that the “A La Carte” option would come with its own starting package of basic channels that would include the broadcast, PEG, and other channels that the distributor selects for all subscribers. Each MVPD participating in the test would have the freedom to repackage content in structures that address the desires of their consumers that are technically supportable on their systems. This plan may result in individual markets with competing Voluntary A La Carte systems or where Voluntary A La Carte programming competes with a traditional offering. Any and all of these potential market situations can add value to understanding Voluntary A La Carte as a potential new structure.

Many parties have taken the position that any form of A La Carte would be detrimental to independent content producers. This is not the case. Instead, MVPDs will use the added capacity and flexibility of digital systems in new ways to sustain or enhance the options for

independent producers. These opportunities will likely result because digital systems create new lower cost capacity. For instance, one of today's analog channels is the equivalent of anywhere from 2 high definition channels up to 8 standard digital channels. This expands opportunities for Independent producers to either sustain or expand their carriage options.

Voluntary A La Carte is not equivalent to a decrease in independent or otherwise "new" programming. In a Voluntary A La Carte regime, A La Carte MVPDs could continue to have the option of offering new independent channels as part of larger packages, but also offer these channels as either very low cost stand-alone channels or in a distinct mini-tier of lower cost content. Alternatively, digital spectrum could be earmarked for "new" program choices and users of this block could have a limited amount of time to demonstrate consumer demand and economic viability.

A Voluntary A La Carte system could potentially expand subscribership. Independent channels tend to focus on specific segments of the general public. An intuitive consequence of better consumer choice is the appeal to a larger group, which in the cable industry, means increased penetration by MVPD service providers. This anticipated expansion of the MVPD customer base enhances the ability of independent programmers to reach their target audiences.

**V. WHAT WE DON'T KNOW ABOUT VOLUNTARY "A LA CARTE" THAT A MARKET TEST COULD HELP US BETTER UNDERSTAND.**

Many parties have already rejected all forms of A La Carte. We believe that there are significant unknowns that need further evaluation before any final judgment is made regarding Voluntary A La Carte. Some of these unknowns include the following:

- What number of subscribers would choose the current structure over a Voluntary A La Carte option?

- What level of “A La Carte” will balance the needs of consumers, distributors, and content producers? We don’t believe the real need is to offer every individual channel on a pick and choose basis.
- How many new customers will come to MVPD systems when offered better choice?
- What really happens to advertising rates and structures as the true value of different subscriber environments is evaluated over time?
- Which channels or types of content may be receiving unfair subsidies in the current structure?
- Which types of content are not legitimately supported by an audience that is significantly large enough to warrant the current carriage? The solutions may not be that the content is discontinued but that it be repackaged or repositioned into digital structures that are not as costly to sustain.
- The potential financial impact on content producers and distributors?
- As well as many of the questions posed in the May 25, 2004 FCC Comment Requests DA 04-1454

In light of the issues posed herein, positions which reject some or all forms of A La Carte are premature and require validation and are potentially self serving, supporting an objective of maintaining some status quo position. A market test may validate positions that are already being stated or it may suggest different conclusions. A market test of Voluntary A La Carte can only enhance the Commission’s ability to come to the best conclusions and better inform the legislative debate in Congress regarding consumer choice, pricing, and indecency issues addressed herein.

## **VI. VOLUNTARY A LA CARTE MARKET TEST IMPLEMENTATION ISSUES**

The most significant issues blocking a proposed market test of a Voluntary A La Carte Structure are the carriage requirements or restrictions of current programming contracts. Current contract constraints that may require relief for the market test include but may not be limited to:

- Must carry
- Retransmission consent
- Tying arrangements
- Eliminate ‘most widely distributed tier’ requirements
- Channel placement requirements
- Potential interim dual carriage issues, analog and digital
- Potential use of digital equivalent to current analog tiers
- Providing contract transparency of terms and conditions for the purpose of leveling the playing field among MVPDs and competitors

Before an MVPD can offer customers Voluntary A La Carte, it is likely existing contracts will require modification. The required contractual modifications will vary based on market, programming distributor and MVPD. Thus, market test participants should create specific A La Carte proposals for each test market. Contract relief for the test could be requested on an as needed basis.

In addition to carriage issues, Voluntary A La Carte, even on a test basis, implicates programming prices. Different pricing structures could be used to either enhance or destroy the possible success of a Voluntary A La Carte offering. Content contracts would need to allow for the unbundling and repackaging of content at reasonable rates where the content producer and the distributor can share in margins produced by any higher prices for “A La Carte” options.

There are a number of pricing issues that may need to be re-evaluated or renegotiated to implement the test.

- Channel placement discounts
- Multi-service discounts or tying discounts
- Premiums charged for “A La Carte” placement versus “most widely distributed tier” placement.

The best starting point will be open negotiations with the affected content vendors. This approach should be pursued before any alternatives of mandated pricing for the market test. Newly negotiated test contract terms and conditions must be transparent, meaning that all terms and conditions should be disclosed and uniform no matter the MVPD size, type of distribution, ownership or location. Possible interim solutions could include but not be limited to:

- An agreed freeze on current cost structures for the test;
- A maximum cost differential between current structure and alternative A La Carte carriage;
- Potential for shared margin between content producer and distributor on price increases benchmarked to current package pricing; and

Other implementation issues that need to be addressed include the length of the test, along with the process to monitor and report on the results. A multiple year test is required to be able to assess the full consumer response and to be able to understand issues like advertising rates that will develop in response to the demonstrated advertising value of new structures. It may also take a few years for market test participants to both adjust the A La Carte offering to meet consumers’ needs and to resolve all of the support issues related to this type of significant change. These related issues will include, but are not limited to, expected technology, billing, customer service, and marketing/advertising implementation.



## **CONCLUSION**

BSPA members believe that there are many industry issues that deserve new and better solutions. The current commitment to migrate to all-digital systems can provide potential solutions that are not possible in today's analog technology. It should first be the responsibility of the industry to find better solutions to the issues of consumer choice, cable rates and indecency. We believe the concept of "Voluntary A La Carte" has enough potential promise and unknown or speculative issues that it deserves a full market test. We therefore ask for the full endorsement and support of the FCC in pursuing this objective of a fair market test for Voluntary A La Carte. We further request that the FCC in its report to Congress recommend this test and ask for the full endorsement and support of Congress as may be needed.

Respectfully submitted,

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